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Nos. 85-965 and 85-966

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROSEMARY LOOMIS, PETITIONER

v.

UNITED STATES OF AMERICA

JON VERMOUTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a dog sniff of petitioner Vermouth's rental storage locker violated petitioners' Fourth Amendment rights (both petitioners).

2. Whether the district court improperly failed to conduct an evidentiary hearing on petitioners' claim that a search warrant application contained material misstatements and omissions (both petitioners).

3. Whether the district court violated the requirements of Fed. R. Crim. P. 30 by delaying a final decision upon whether to give a jury instruction concerning deliberate ignorance until after defense counsel's closing argument (petitioner Loomis only).

4. Whether, under the facts of this case, the district court properly gave an instruction that conscious avoidance of the truth can constitute proof of the element of guilty knowledge (petitioner Loomis only).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A20) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1985. Petitions for rehearing were denied on October 22, 1985. The petitions for a writ of certiorari were filed on December 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition filed in No. 85-965.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Vermouth was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of using a telephone to facilitate the commission of a felony, in violation of 21 U.S.C. 843; and four counts of interstate travel to facilitate narcotics trafficking, in violation of 18 U.S.C. 1952.[2] He was sentenced to concurrent terms of 12 years' imprisonment on the conspiracy and possession counts, four years' imprisonment on the telephone facilitation count, and five years' imprisonment on the interstate travel counts. He also was sentenced to a three-year special parole term and ordered to pay a total of $50,000 in fines.

Following a jury retrial[3] in the same district, petitioner Loomis was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1). She was sentenced to concurrent three-year terms of imprisonment and ordered to pay a $20,000 fine. The court of appeals affirmed both convictions.

1. During early 1983, Santa Barbara County, California, police conducting an investigation of burglaries of several storage warehouse facilities concluded that the burglars

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[2]The district court dismissed one possession count, and the jury was unable to reach a verdict on one count alleging the conduct of a continuing criminal enterprise.

[3]Petitioner Loomis was initially tried jointly with petitioner Vermouth and acquitted on one cocaine possession count. The jury in that case, however, was unable to reach a verdict on the conspiracy count and on another possession count.

were likely seeking to obtain narcotics stored at the facilities. To further their investigation, the officers obtained permission from the proprietor of one of the facilities to run narcotics detecting dogs through the warehouse. Petitioner Vermouth had rented storage locker No. 285 in the facility. Pursuant to the rental contract, Vermouth had agreed not to store contraband on the premises and to permit the owner of the warehouse, who retained pass keys for all units, to remove such items (E.R. 21-24).[4]

On April 12, 1983, investigators arrived at the facility with two narcotics detection dogs, "Ali" and "Dutch." After both dogs were given a "warm-up" exercise requiring them to find a bag of marijuana that the officers had hidden, each was separately walked through the locker area. The dogs alerted to a total of nine lockers. Both alerted to the same five lockers, one of which was locker No. 285. E.R. 29-31. The officers then applied for warrants authorizing searches of the lockers to which both dogs had alerted. The search warrant application for Vermouth's locker related how both dogs had alerted to it independently, as well as the dogs' qualifications and training in locating drugs. In particular, the application averred that Dutch had been used on numerous occasions to locate contraband and that the validity of the animal's alerts had been accepted by numerous state and federal courts. As to Ali, the application averred that, in prior cases, no narcotics were found when the dog did not alert, but that "in the cases he did alert, there were narcotics found" (E.R. 174).

After receiving a warrant from a local judge, a search of locker No. 285 revealed the presence of two footlockers containing approximately 50 pounds of high quality cocaine, bags containing cocaine residue, testing devices for

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[4]"E.R." and "Supp. E.R." refer to the excerpt of record and supplemental excerpt of record in the court of appeals in the *Vermouth* case.

cocaine, and paperwork bearing the names of both petitioners (E.R. 35). Evidence found in the locker, as well as other evidence the officers gathered, led the officers to believe that still more evidence of drug trafficking could be obtained at 822 North Voluntario Street, Santa Barbara, California, a small apartment occupied by Vermouth and petitioner Loomis, his girlfriend

The police executed a warrant to search this address on April 15, 1983. Upon entering the apartment, one of the officers observed Vermouth take a metal suitcase and place it in the bathroom. Loomis was observed lying in bed (Loomis Tr. 26-27). The ensuing search of the apartment resulted in the discovery of a 5-pound quantity of cocaine in the suitcase, smaller quantities of cocaine lying in open view in the kitchen, a plastic bag of cocaine in a filing cabinet used by both petitioners, and passports showing that both petitioners had travelled to Colombia, a major source country for cocaine, during 1980 (Loomis Tr. 37-40, 179, 184-186, 471-473). After the officers discovered that Loomis had rented a storage locker at a different facility, they obtained a warrant to search it and found that it contained instruments used to dilute cocaine as well as a device to test the substance (Loomis Tr. 252-254) (Pet. App. A12).

Prior to trial, both petitioners filed a motion to suppress the evidence found in locker No. 285. They claimed that the use of drug detecting dogs at the storage locker warehouse violated their Fourth Amendment rights and that the application submitted in support of the warrant to search Vermouth's locker contained material misstatements and omissions. To support the latter claim, petitioners submitted affidavits averring that, although the search warrant application stated that Ali had always proven reliable in the past in detecting drugs, the performance records of both animals reflected that they had a history of giving false alerts. In addition, petitioners contended that the animals' apparent

fatigue, cold and windy weather conditions on the day of the search, and their failure to alert to a sample amount of a controlled substance during a test run further decreased the reliability of their alerts on locker No. 285. Petitioners maintained that these factors had been intentionally omitted from the search warrant affidavit. E.R. 113-165.

In response, the government submitted the affidavit of the Customs Service official responsible for management of the detection dog program in the Service's Pacific Region. The official stated that the only proper basis for evaluating the performance records of drug detecting dogs is the Service's annual performance evaluation and that those evaluations reflected that both dogs performed with a high degree of accuracy. Petitioners' statistical data to the contrary were derived from monthly utilization reports that had no bearing whatsoever on the dogs' proven reliability. The official also stated that neither wind conditions nor the animals' prior utilization on the day in question would have affected the accuracy of their alerts, because winds enhance odors, both animals were accustomed to working outdoors, and neither was tired upon arriving at the storage facility. Supp. E.R. 191-205.

The district court denied the motions to suppress the evidence found in locker No. 285. The court first found that neither petitioner had a reasonable expectation of privacy in the storage locker because the lease that Vermouth signed permitted the proprietor to enter and remove contraband (E.R. 49). In any event, the court ruled that petitioners were not entitled to an evidentiary hearing regarding the alleged inaccuracies in the affidavit because of their failure to make the " 'substantial preliminary showing' " required by *Franks* v. *Delaware*, 438 U.S. 154 (1978) (E.R. 50). In particular, the court found that the controverted statements concerning Ali's proven track record were made in good faith, and that, in any event, even if misstatements had been

intentionally made with respect to Ali's record, they were immaterial because Dutch, who was not the subject of any claims of misrepresentation, also alerted to locker No. 285 (E.R. 51-53). With respect to the allegation that the affidavit contained material omissions concerning the dogs' inability to work outdoors during windy weather conditions or when fatigued, the court held that petitioners "failed to make a substantial preliminary showing that the dogs' reliability was adversely affected by the factors they claim existed and that the affiant intentionally or recklessly failed to include any material information in his affidavit" (E.R. 54). Instead, the court found that, because air currents and outside temperatures that are colder than the temperature within a container actually enhance odors, the omitted material would have served to further establish probable cause (E.R. 54-55).

2. Although Loomis did not testify in her own behalf, she sought to demonstrate through cross-examination of government witnesses that she was unaware of Vermouth's drug trafficking activities (Pet. App. A11-A12; see *e.g.*, Tr. 264-265, 314, 520-522). In light of this line of defense, the government proposed that the court instruct the jury, as permitted by *United States* v. *Jewell,* 532 F.2d 697 (9th Cir.) (en banc), cert denied, 426 U.S. 951 (1976), that an inference of guilty knowledge may be established by evidence of conscious avoidance of the truth. Without objection from the defense, the court stated that it would give the instruction. At the close of the trial, however, defense counsel objected to the instruction, claiming that petitioner had not "affirmatively * * * stated that she was unaware of certain acts or certain evidence that came into the case" (Loomis Tr. 630). In response, the district court stated that it was "going to mark [the proposed instruction] with a question mark and see what comes out in argument from

especially the defendant's side, and then * * * make a decision whether it is appropriate to give it" (*ibid.*). Loomis's counsel did not object to this proposed course of action and proceeded to argue in summation that Vermouth was engaged in illegal conduct without Loomis's knowledge of his dealings (Loomis Tr. 658-682). Following this argument, the district court stated that it thought that it "must give the *Jewell* instruction because of the nature of the argument of the defendant having to do with a suggestion that she had no knowledge of any of the incriminating evidence" (Loomis Tr. 682). The district court therefore gave the instruction despite petitioner's objection (Loomis Tr. 682).

3. The court of appeals affirmed both convictions (Pet. App. A3-A20). In particular, the court held that the district court properly denied an evidentiary hearing on the question whether the search warrant affidavit contained material misstatements concerning the detecting dogs' capabilities, because petitioner Vermouth failed to show that the alleged omissions in the document were intentional or reckless efforts to exaggerate the basis for probable cause and because, in any event, any misstatements concerning the capabilities of one of the dogs were inconsequential because both animals had alerted to the locker (*id.* at A6). Relying upon *United States* v. *Place*, 462 U.S. 696 (1983), the court of appeals also rejected the argument that the dog sniff of the locker area was a search triggering Fourth Amendment protections (Pet. App. A18). Addressing Loomis's claim that the evidence did not warrant a *Jewell* instruction because she did not personally testify as to her lack of knowledge of Vermouth's unlawful activities, the court of appeals held that defense counsel's questions on cross-examination and his argument were sufficient to raise the issue of deliberate ignorance (Pet. App. A11-A12). Finally, the court rejected Loomis's claim that the trial judge violated Fed. R. Crim. P. 30 by delaying the decision to give the

Jewell instruction until after closing argument. The court of appeals held that the district court sufficiently delineated its proposed action to the parties prior to argument to comply with the requirements of the rule. Pet. App. A12-A13.

ARGUMENT

1. Petitioners contend (85-966 Pet. 8-12; 85-965 Pet. i-ii & n.i) that the use of sniffing dogs to detect the odor of controlled substances emanating from Vermouth's rented storage locker violated their Fourth Amendment privacy interests. Preliminarily, as the court below observed (Pet. App. A18), we note that petitioner Loomis has never alleged any facts to indicate that she maintained a reasonable expectation of privacy in the locker. She therefore cannot challenge the propriety of the procedure on Fourth Amendment grounds. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).[5] In any event, the claim is without merit as to both petitioners and was correctly rejected by the court of appeals.

In *United States* v. *Place*, 462 U.S. 696 (1983), the Court held that a canine sniff of luggage at an airport does not constitute a search within the meaning of the Fourth Amendment. As the Court explained (*id.* at 707):

> A "canine sniff" by a well-trained narcotics detection dog * * * does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the

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[5]Although the court of appeals did hold that petitioner Vermouth had a legitimate expectation of privacy in locker No. 285 (Pet. App. A4), we question the correctness of that ruling in light of Vermouth's agreement to give the owner of the facility access to remove contraband. But there is no need to pursue this issue, because, for the reasons discussed in text, the dog sniff was not a "search" within the meaning of the Fourth Amendment.

> luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, thesniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Thereafter, in *United States* v. *Jacobsen,* 466 U.S. 109, 123-124 (1984), the Court reiterated that a canine sniff test is not a search within the meaning of the Fourth Amendment and explained that the reason why it does "not intrude upon any legitimate privacy interest [is] that the governmental conduct [can] reveal nothing about noncontraband items." *Id.* at 124 n.24. See also *United States* v. *Beale,* 736 F.2d 1289 (9th Cir. 1984) (en banc), cert. denied, No. 84-404 (Dec. 3, 1984).

The court below therefore correctly concluded that, for purposes of the Fourth Amendment, it was inconsequential that the area subjected to the sniff test was in this case a storage locker facility (in which—apart from the locker itself—petitioner had no expectation of privacy) rather than a more public area such as an airport (Pet. App. A18). In either case, the technique does not infringe upon legitimate privacy interests, and it therefore does not constitute a search to which the protections of the Fourth Amendment apply.

As petitioners note, however (85-966 Pet. 8-9), the Second Circuit has expressed the view that *Place* does not always immunize the use of sniffing dogs from Fourth Amendment scrutiny. In the course of affirming convictions in *United States* v. *Thomas,* 757 F.2d 1359 (2d Cir.

1985), cert. denied, No. 84-1778 (Oct. 7, 1985), the court stated that the use of a sniffing dog outside the defendant's apartment to detect the presence of drugs inside constituted a search that, in the absence of a warrant, violated the Fourth Amendment. Distinguishing this Court's holding in *Place,* the court reasoned (757 F.2d at 1367 (citation omitted)):

> The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." * * * Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Although we believe the Second Circuit's reasoning to be incorrect, the decision in *Thomas* and the holding of the court below have not resulted in a conflict among the circuits that requires resolution by this Court. In the first place, although *Thomas* was issued after this Court's decision in *Jacobsen,* the *Thomas* court made no reference to *Jacobsen* and failed to address the Court's explanation in that case that the reason the dog sniff in *Place* did not constitute a search was not merely because the dog was used in a public airport terminal, but because the technique did not intrude on any legitimate privacy interest in noncontraband items. *Jacobsen,* 466 U.S. at 124 & n.24. The Second Circuit should be accorded the opportunity to reconsider its reasoning in light of this Court's amplification in *Jacobsen* of the rationale underlying the Court's holding in *Place.*[6]

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[6]Because the *Thomas* court found that law enforcement officers acted in good faith reliance on a search warrant issued on the basis of the dog's alert, it refused to suppress evidence found in co-defendant Wheelings' apartment, citing *United States* v. *Leon,* No. 82-1771 (July 5, 1984),

But even ignoring the *Thomas* court's disregard of *Jacobsen, Thomas* creates no conflict with the decision of the court below, because the Second Circuit's decision was predicated upon one's "heightened expectation of privacy inside his dwelling," 757 F.2d at 1367, as compared to one's "much diminished" expectation of privacy in luggage in the custody of an air carrier at an airport (*id.* at 1366). The dog sniff in the instant case did not take place at the doorway of a private dwelling. Instead, the sniff was conducted at a warehouse, with the consent of the facility's proprietor, in a common area alongside the storage lockers. The tenants of those lockers had no privacy interest in that area and, indeed, a "much diminished" (*ibid.*) interest in the lockers themselves by virtue of their written agreements permitting entry by the proprietor for the purpose of removing contraband. Accordingly, even under the reasoning in *Thomas*, the dog sniff here would not have violated any legitimate privacy interests.[7]

2. Petitioners also claim (85-966 Pet. 12-16; 85-965 Pet. ii & n.ii) that the district court erred by failing to conduct an evidentiary hearing on their claim that the affidavit seeking

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and affirmed the conviction. Accordingly, the government did not seek further review of the case.

[7]Although the court of appeals rejected the government's argument that the terms of the rental agreement eliminated any reasonable expectation of privacy by petitioner Vermouth in locker No. 285, the court did acknowledge that the owner of the facility maintained access to it, thereby diminishing that expectation. Pet. App. A4-A5.

We also note that, contrary to petitioner Vermouth's contention (85-966 Pet. 9), the decision of the Fifth Circuit in *Horton* v. *Goose Creek Independent School District*, 690 F.2d 470 (1982), cert. denied, 463 U.S. 1207 (1983), does not conflict with the holding of the court of appeals. In that case, consistently with the decision of the court below, the court held that "the [dog] sniffs of the lockers and cars [of school students] did not constitute a search and therefore we need make no inquiry into the reasonableness of the sniffing of the lockers and automobiles." 690 F.2d at 477 (footnote omitted).

authorization to search Vermouth's locker contained misleading statements and omissions, and instead determining the issue on the basis of affidavits submitted by the parties. This fact-bound issue was resolved properly by the court below and does not warrant further review.[8]

As this Court explained in *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978) (footnote omitted), "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. * * * The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Petitioners did not meet these requirements. Although petitioners' motions to suppress alleged that the affidavit misrepresented Ali's track record and omitted relevant data concerning both dogs' ability to detect contraband when fatigued and during adverse weather conditions, petitioners made no showing whatever that the affiant had intentionally or recklessly misrepresented Ali's qualifications, which the affiant had obtained from Ali's handler, or omitted other pertinent information in order to give an exaggerated impression of the animals' capabilities. See Pet. App. A6. In any event, the alleged inaccuracies concerning Ali's record are inconsequential. Here, as in *United States* v. *Spetz*, 721 F.2d 1457, 1464 (9th Cir. 1983),

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[8]We again note that petitioner Loomis's failure to demonstrate any privacy interest in Vermouth's storage locker precludes her from seeking suppression of the evidence obtained from the locker.

Dutch's independent alert on Vermouth's locker corroborated Ali's alert and made the claimed discrepancies immaterial. See Pet. App. A6.

3. Petitioner Loomis claims (85-965 Pet. 6-13) that the district court violated Fed. R. Crim. P. 30 by delaying a final determination whether to give an instruction concerning conscious avoidance of knowledge until after her attorney had completed his summation. In particular, she maintains that the procedure adopted by the district court improperly precluded defense counsel from anticipating and addressing the instruction during closing argument. The court below correctly concluded, however, that the procedure employed by the district court did not violate Rule 30.

Fed. R. Crim. P. 30 requires the district court to "inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury." "The rule's object [is] to fairly inform the trial lawyers so that they may intelligently argue to the jury." *United States* v. *Fusaro,* 708 F.2d 17, 22 (1st Cir.), cert. denied, 464 U.S. 1007 (1983). Here, prior to the summations, the district court made it clear that whether a conscious avoidance instruction would be given would depend upon whether defense counsel argued to the jury that Loomis was unaware of Vermouth's unlawful activities, and the defense neither interposed an objection nor sought further clarification as to this course of action. See Loomis Tr. 629-630. As the court below reasoned (Pet App. A12-A13), the district court therefore announced its "proposed action" (Fed. R. Crim. P. 30) in a manner that fully accorded petitioner's counsel the ability to anticipate such an instruction, given the argument that he presented, and to address it during the argument if he considered it necessary to do so.

4. Finally, petitioner Loomis claims (85-965 Pet. 13-16) that, under the circumstances of this case, it was improper for the district court to give a conscious avoidance instruction. More specifically, she maintains that the instruction was unwarranted because the only pertinent evidence tended to show that she possessed actual knowledge of Vermouth's activities and not that she deliberately avoided knowledge of what was occurring. This fact-bound claim does not merit review.

An instruction on conscious avoidance is proper "when a defendant claims a lack of guilty knowledge and there are facts in evidence that support an inference of deliberate ignorance." *United States* v. *McAllister,* 747 F.2d 1273, 1275 (9th Cir. 1984). The justification for the instruction is that "deliberate ignorance and positive knowledge are equally culpable * * * [and that] [t]o act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required." *United States* v. *Jewell,* 532 F.2d 697, 700 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).

As the court below correctly concluded (Pet. App. A11-A12), petitioner herself, in an attempt to prove her lack of knowledge of Vermouth's drug distribution activities, injected evidence through her questions on cross-examination of government witnesses from which it could be inferred that, if she truly lacked knowledge, her ignorance had to be the product of conscious avoidance. In addition, evidence presented by the government, such as the presence in the apartment she shared with Vermouth of large quantities of cocaine, anti-surveillance devices, and large amounts of cash and other assets far in excess of petitioners' licit income, permitted the inference that, if Loomis was as

unaware of Vermouth's activities as she claimed to be, such ignorance was deliberately calculated to avoid learning the truth.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

FEBRUARY 1986

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[9]This case is distinguishable from other Ninth Circuit cases, *United States* v. *Beckett*, 724 F.2d 855 (~~Cir.~~ 1984), and *United States* v. *Garzon*, 688 F.2d 607 (~~Cir.~~ 1982), upon which Loomis relies to support her claim that evidence suggesting actual knowledge of unlawful activity does not justify a conscious avoidance instruction (85-965 Pet. 14 & n.13). In *Beckett*, the uncontradicted evidence was that the defendant acknowledged to an undercover FBI agent that a bag of cocaine his roommate was selling contained that substance. In contrast to this case, therefore, nothing in *Beckett* indicated "that the defendant tried to close his eyes or ears to what was happening." 724 F.2d at 856. In *Garzon*, although the defendant claimed at trial that he had no knowledge of a cocaine transaction conducted by his father in his presence, he admittedly opened the bag containing the cocaine. 688 F.2d at 609. There was thus no evidence from which a jury reasonably could conclude that he contrived to avoid learning of the deal. *Ibid.*